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U.S. Citizenship
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Services

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MAR 22 2004

FILE: WAC 01 242 50934 Office: CALIFORNIA SERVICE CENTER Date:


IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for a Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition and continuing until the present.

On appeal, the petitioner's co-owner submits additional information and asserts that the director failed to adequately evaluate the petitioner's financial status.¹

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g) states in pertinent part:

(2) *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this case rests upon the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. 204.5(d). Here, the petition's priority date is April 2, 1996. The beneficiary's salary as stated on the approved labor certification is \$10.19 per hour or \$21,195.20 annually. The Dept. of Labor Form ETA-750, Part B, contained in the record, indicates that the petitioner has employed the beneficiary since 1992.

The petitioner initially submitted insufficient evidence of its ability to pay the beneficiary's offered wage. The director requested further evidence on June 10, 2002. He instructed the petitioner to submit additional evidence of its ability to pay the beneficiary's wage and to document the beneficiary's prior employment experience.

Included in its response to the director's request for evidence related to the petitioner's ability to pay the proffered wage, the petitioner submitted copies of IRS printouts related to the beneficiary's tax returns for the years 1991 to

¹ One of the petitioner's co-owners filed the appeal. The record also contains a notice of entry of appearance by a representative or attorney. As no withdrawal of representation is contained in the record, a copy of this decision will be provided to the representative.

2002. The highest wages posted in any of the years appears to be \$13,462 in 1998. These records do not reflect that the petitioner provided the beneficiary's income, and as such, are of little evidentiary value in showing that the petitioner paid the proffered wage to the beneficiary during this time.

The petitioner also submitted copies of its Form 1120S U.S. Income Tax Return for an S Corporation for the years 1996 through 2001, and evidence indicating that it does business in the name of "Between the Lines, Inc." The 1996 tax return shows that the petitioner had gross receipts/sales of \$721,944, officers' compensation of \$27,000, salaries and wages of \$143,568, no labor costs, and an ordinary income of -\$59,198. Schedule L of this tax return also reflected that the petitioner had -\$38,434 in net current assets.

The 1997 tax return shows that the petitioner claimed gross receipts/sales of \$671,223, no officers' compensation, no labor costs, \$171,765 in salaries and wages, and -\$11,725 as ordinary income. Schedule L reflects that the petitioner had -\$32,200 in net current assets.

The 1998 return shows that the petitioner claimed gross receipts/sales of \$625,576, officers' compensation of \$24,000, no labor costs, salaries and wages of \$111,713, and -\$87,374 in ordinary income. Schedule L indicates that the petitioner had -\$66,574 in net current assets.

The 1999 return indicates that the petitioner had gross receipts/sales of \$583,508, no officers' compensation, no labor costs, \$49,375 in salaries and wages, and -\$54,258 in ordinary income. Schedule L for this year shows that the petitioner had -\$91,991 in net current assets.

The 2000 return shows that the petitioner had gross receipts/sales of \$717,840, no officers' compensation, no labor costs, \$46,824 in salaries and wages, and -\$55,146 in ordinary income. Schedule L reflects that the petitioner had -\$123,832 in net current assets.

The 2001 return indicates that the petitioner had gross receipts/sales of \$774,190, no officers' compensation, no labor costs, \$70,200 in salaries and wages, and ordinary income of -\$4,970. Schedule L of this return shows that the petitioner's net current assets were -\$69,185.

As noted above, the director denied the petition determining that the petitioner had not established its ability to pay the proffered wage as of the priority date of the visa petition and continuing until the present. The director noted that all of the tax returns showed that the petitioner's net income balances were negative, indicating that the beneficiary's offered wage could not be covered. We concur and further note that the petitioner's net current assets for all of the years were also negative figures and clearly do not represent available funds necessary to meet the beneficiary's offered wage. Additionally, the record contains no copies of W-2s or other payment records specifically indicating the amount of wages that the petitioner has actually paid to the beneficiary.

On appeal, the petitioner's owner resubmits a partial copy of the petitioner's 2001 corporate tax return. He contends that the petitioner's gross income should be considered when evaluating the petitioner's ability to pay. In determining the petitioner's ability to pay the proffered wage, the Bureau will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that the Bureau had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent.

Elatos Restaurant Corp. v. Sava, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The owner also contends that the position is not a new position and that the beneficiary's wages could be paid out of the salaries and wages already disbursed. We note that the record contains no supporting evidence to show which departed employee the beneficiary would replace, the description of the departed employee's duties, and proof of the wages paid to that employee. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the petitioner's burden of proof. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Based on a review of the record, we cannot conclude that the petitioner has demonstrated its ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent resident status.

Beyond the decision of the director, it is noted that the record contains no evidence corroborating the beneficiary's prior employment experience pursuant to the director's June 2002 request and the regulatory requirements set forth in 8 C.F.R. § 204.5(g)(1). That regulation requires that the evidence relating to the qualifying work experience be submitted from the relevant employer describing the beneficiary's specific duties performed and including the name, address, and title of the writer.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.